

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

TONY ANDRE JORDAN, #050547

Petitioner,

v.

2:05CV751

**GENE M. JOHNSON, Director of the
Virginia Department of Corrections,**

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to petitioner's convictions on January 27, 2003, in the Circuit Court for the City of Suffolk, Virginia, for conspiracy to commit murder, conspiracy to commit statutory burglary, conspiracy to commit robbery, and attempted statutory burglary with intent to commit murder, rape, robbery, or arson while armed, as a result of which he was sentenced to serve fourteen years in the Virginia penal system.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. On March 16, 2006, the Magistrate Judge filed his report and recommendation, recommending dismissal of the petition pursuant to the statute of limitations, the petition having been filed almost three months beyond the cut-off date of September 28, 2005. Petitioner objected to the report, asserting that he filed his petition on September 13, 2005, when he delivered it to the prison authorities for mailing. The Magistrate Judge then contacted the

mail room at Red Onion State Prison, and was advised that petitioner delivered no mail addressed to the United States District Court during the month of September, 2005. In the face of the controversy, an evidentiary hearing was ordered, and on August 29, 2006, the hearing was conducted. Petitioner was present and represented by court-appointed counsel, and respondent was present, by counsel. On September 20, 2006, the Magistrate Judge filed an "Amended Magistrate Judge's Report and Recommendation," recommending dismissal of the petition. By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On October 25, 2006, counsel for petitioner filed a motion for extension of time within which to file objections to the report, due to his absence from the United States from September 21, 2006, until October 19, 2006. The motion was granted, and petitioner's objections to the amended report and recommendation were received October 30, 2006.

The Court, having reviewed the record and examined the objections filed by the petitioner and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the amended report of the United States Magistrate Judge filed September 20, 2006. It is, therefore, ORDERED that the petition be DENIED and DISMISSED pursuant to the statute of limitations and that judgment be entered in respondent's favor.

To the extent that petitioner objects to the Magistrate Judge's findings and recommendations, the objections are without merit. Petitioner was given an opportunity to state his case in the evidentiary

hearing. As a witness, petitioner testified that he mailed his petition not later than September 13, 2005. However, he presented no evidence to support his position, not even a confirmation by Teresa Pease, the employee at Red Onion Correctional Center responsible for logging all legal mail.

Contrary to petitioner's claim, Pease's testimony clearly established that on September 1, 2005, petitioner mailed two envelopes, the first addressed to the Fourth Circuit Court of Appeals and the second addressed to the Supreme Court of Virginia. On September 27, 2005, petitioner mailed an envelope addressed to the Circuit Court of Suffolk, Virginia. Between August, 2005, and December, 2005, petitioner delivered no envelopes for mailing from Red Onion addressed to the United States District Court.

In assessing the credibility of the witnesses, the Magistrate Judge found Pease's testimony to be more credible and believable. Petitioner had the opportunity to date his petition, but he failed to do so. Further, it cannot be established that the petition received in this matter was mailed from Red Onion. The Magistrate Judge concluded that it is likely that petitioner gave the material to a member of his family for mailing at a later time, but petitioner was not able to establish when that occurred. The Magistrate Judge chose to rely upon the testimony of Teresa Pease, and this Court agrees. Petitioner is not entitled to any further consideration.

Petitioner may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk,

Virginia 23510, within thirty days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

The Clerk shall mail a copy of this Final Order to petitioner and to counsel of record for the respondent.

/s/ Jerome B. Friedman
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

January 12, 2007